

JAN 19 2006

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

NOMAR VIRGEN-RUELAS,

Defendant - Appellant.

No. 05-10030

D.C. No. CR-04-00195-RCJ/RJJ

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert C. Jones, District Judge, Presiding

Submitted January 9, 2006**

Before: HUG, O'SCANNLAIN, and SILVERMAN, Circuit Judges.

Nomar Virgen-Ruelas appeals the 57-month sentence imposed following his guilty-plea conviction for illegal reentry after deportation in violation of 8 U.S.C. § 1326(a), enhanced by § 1326(b)(2). We have jurisdiction pursuant to 28 U.S.C.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

§ 1291 and 18 U.S.C. § 3742(a).

Virgen-Ruelas contends that the district court committed Sixth Amendment error by considering the fact of a prior conviction which was neither proved to a jury beyond a reasonable doubt nor admitted by him. This contention is foreclosed by *United States v. Hernandez-Hernandez*, No. 02-30429, 2005 WL 3440815 (9th Cir. Dec. 16, 2005) and *United States v. Moreno-Hernandez*, 419 F.3d 906, 914 n. 8 (9th Cir. 2005) (“Booker bars the district court from considering only those facts not found by the jury other than the fact of prior conviction”) (citing *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 756, 160 L.Ed.2d 621 (2005)). Virgen-Ruelas acknowledges that his contention is foreclosed by Ninth Circuit precedent, but states in his brief that he seeks to preserve this issue in order to facilitate potential post-conviction litigation.

Because Virgen-Ruelas was sentenced under the then-mandatory Sentencing Guidelines, and we cannot reliably determine from the record whether any error in the imposition of the sentence under the then-mandatory Sentencing Guidelines was harmless, we remand to the sentencing court to answer that question, and to proceed pursuant to *United States v. Ameline*, 409 F.3d 1073, 1084 (9th Cir. 2005) (en banc). *See Moreno-Hernandez*, 419 F.3d at 916.

REMANDED.